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IN THE

Supreme Court of the United States

PROGRESS ENERGY, INC.,
Petitioner,

v.

BARBARA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

RAE T. VANN
Counsel of Record
ALEXANDRA TSIROS
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the petition for a writ of certiorari.[1]

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

All of EEAC's members are employers subject to the Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601 *et seq.*, as well as other labor and employment statutes and regulations. As employers who are potential defendants in FMLA and other employment-related lawsuits, EEAC's members have a direct interest in preserving effective, voluntary means of resolving both actual and potential claims without the costs, risks, and other burdens associated with litigation. The uncertainty that now exists in the courts of appeals jeopardizes that interest by making it impossible for a party to know whether or not a general release is enforceable without litigation. Because of its significant experience in these matters, EEAC is uniquely qualified to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Barbara Taylor worked for Carolina Power & Light Company, a subsidiary of Progress Energy, from 1993 until 2001, when she was terminated as part of

a reduction in force. Pet. App. 45a-46a. Upon her discharge, in exchange for a transition pay severance benefit of $11,718, Taylor signed a "General Release and Severance Agreement" waiving all employment-related claims, including those arising under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, based on incidents that occurred up to the date of the agreement. *Id.* at 52a.

In 2003, Taylor filed an action in the U.S. District Court for the Eastern District of North Carolina at Wilmington, claiming the company violated the FMLA by failing to fully advise her of her rights, denying her FMLA leave, and terminating her in retaliation for complaining about alleged FMLA violations. *Id.* Progress Energy moved for summary judgment, contending that the release Taylor signed in 2001 was valid and a complete defense to the action. *Id.* at 22a. Taylor responded by arguing that Section 825.220(d) of the FMLA regulations—which provides "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA"—rendered the release invalid as to her FMLA claims. *Id.* at 53a.

The district court granted Progress Energy's motion for summary judgment, holding that Section 825.220(d) did not render the release unenforceable. *Id.* at 58a, 63a. Relying on the Fifth Circuit's ruling in *Faris v. Williams WPC-I, Inc.*, it concluded that Section 825.220(d) applied only to waivers of prospective, or future, FMLA substantive rights, not claims for an alleged past violation of those rights. *Id.* at 58a.

On appeal, a three-judge panel of the Fourth Circuit reversed the decision, concluding that the regulation was intended to prohibit both retro-

spective and prospective waivers of FMLA rights. *Id.* at 22a. Progress Energy petitioned for panel rehearing, and the Secretary of Labor filed an *amicus* brief in support of the petition, disagreeing with the Fourth Circuit's interpretation of the regulation. *Id.* at 3a. The court granted panel rehearing and asked the Department of Labor to brief the issue. *Id.* The panel, divided after rehearing, reinstated its decision, ignoring both the Fifth Circuit's decision in *Faris* and the Department of Labor's position that the regulation does not require supervision and bars only prospective waivers. *Id.* Progress Energy petitioned the court for rehearing *en banc,* which was denied. *Id.* at 67a. It filed the instant Petition for a Writ of Certiorari on October 22, 2007.

SUMMARY OF REASONS FOR GRANTING THE WRIT

A divided Fourth Circuit panel ruled that FMLA waivers are not enforceable unless executed under supervision of the Department of Labor or the federal courts. Pet. App. 3a. The ruling is inconsistent with the position taken by the Department of Labor and by the Fifth Circuit that FMLA claims can be waived. *See* Brief for the Secretary of Labor as *Amicus Curiae* at 4; Supplemental Brief on Panel Rehearing for the Secretary of Labor as *Amicus Curiae* at 4; *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). The decision below imposes an unwarranted supervision requirement that adds a significant obstacle to future settlement of employment-related claims, which would be disadvantageous to employers and employees alike. Requiring supervision of FMLA waivers would mean that all general releases that include an FMLA waiver—regardless of whether the underlying dispute involves an FMLA claim—would

have to be supervised by a court or the Department of Labor, or else risk eliminating the incentive to settle employment-related claims in return for a general release. In addition, the decision calls into question the validity of general releases that *already* have been signed by potentially thousands of employees.

Furthermore, because the panel majority's decision conflicts with the Fifth Circuit's ruling in *Faris,* there now exists a conflict in the courts which, if not resolved by this Court, will cause significant confusion for multi-state employers seeking to implement uniform and consistent practices for the resolution of employment-related disputes. Having varying employment practices across the country impacts a company's smooth operations and creates confusion for employees. The financial impact on employers and employees is incalculable.

The Fourth Circuit's decision also is not mandated by law. The panel majority below placed too much emphasis on the similarities between the FMLA and the Fair Labor Standards Act to conclude that waivers under the FMLA are not permitted without Department of Labor or federal court supervision, while ignoring the significant differences between the two laws.

Under the rule announced by the panel majority below, any employee—even after signing a waiver and, in exchange, accepting significant remuneration —could retain the money already received under the severance program or settlement agreement and still sue his or her employer, as precisely was the case here. Without definitive guidance from this Court, employers will be much less likely to enter into financial settlement agreements or severance arrangements with employees whose promises not to

sue would not ultimately guarantee final resolution of the matter.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE DEPARTMENT OF LABOR REGULATION AT 29 C.F.R. § 825.220(d) PRECLUDES THE PRIVATE SETTLEMENT OR RELEASE OF CLAIMS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, 29 U.S.C. §§ 2601 *ET SEQ.*

A. The Decision Below Disregards The Importance Of Private Resolution Of Actual And Potential Employment Disputes And Would Impose A Severe Hardship On Both Employers And Employees

Workplace layoffs and terminations occur and will continue to occur. According to the most recent U.S. Department of Labor, Bureau of Labor Statistics Mass Layoff report, for the last quarter of 2006, there were 1,640 "extended mass layoffs," defined as layoffs affecting 50 or more workers for at least 31 days, impacting at least 330,848 employees.[2] In September 2007 alone, there were 1,271 "mass layoffs", defined as layoffs of 50 or more workers from a single employer, impacting at least 123,656 employees.[3]

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[2] U.S. Dep't of Labor, Bureau of Labor Statistics, *News: Mass Layoffs in September 2007*, Table 4 (Oct. 23, 2007), *available at* http://www.bls.gov/news.release/pdf/mmls.pdf.

[3] *Id.* at 1.

Faced with the reality of workforce reductions, many employers offer severance benefits to ease an employee's transition to unemployment. Some employers, depending on financial circumstances and other considerations, also offer early retirement incentives and other voluntary programs in these situations. It is not uncommon for employees to sign general releases of claims against their employers in exchange for these separation benefits. *See International Bhd. of Elec. Workers, Local 1992 v. Okonite Co.*, 189 F.3d 339, 348 (3d Cir. 1999) (Rosenn, J., dissenting) (discussing history of severance packages and releases of claims in context of WARN Act waivers).

The panel majority decision below will have a tremendous impact on the practice of granting voluntary separation incentives and involuntary separation severance pay programs to employees. By ruling that these releases are unenforceable without Department of Labor or court supervision with respect to FMLA claims and removing the security they provide against future litigation, the Fourth Circuit has created a huge disincentive for employers to offer separation benefits.

The impact of the decision below—namely, the hesitancy to offer severance packages without a full release—will likely be absorbed by the employees who would have benefitted from these separation benefits. No longer will individuals faced with unemployment receive the financial safety net that these enhanced benefits provide. Most employees participating in these arrangements have no reason to believe their termination is unlawful and willingly sign a release as consideration for some peace of mind and financial security during their employment

transition. This financial safety net now has been placed in jeopardy as a result of the decision below.

B. The Decision Below Would Require Employers To Utilize Different Policies In Different Jurisdictions Creating Obstacles To The Private Settlement of Employment-Related Disputes

The panel majority decision below is in direct conflict with the Department of Labor's interpretation of its regulation and with the Fifth Circuit's 2003 decision in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). In *Faris*, the Fifth Circuit held that Section 825.220(d) does not bar an individual from voluntarily waiving his or her FMLA claims, observing that the FMLA is similar to other employment discrimination statutes like Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, both of which allow for unsupervised releases of accrued claims. 332 F.3d at 321.

As a practical matter, the conflict created by the panel majority's decision below means employers will be required to implement different settlement practices and severance programs depending on the jurisdiction in which they are doing business. As the Fifth Circuit noted in *Faris*, there is a strong public policy in allowing waivers and favoring the private resolution of employment disputes. *Id.* at 321-22; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The inevitable consequence of the decision below, however, is that more actions will be filed in federal courts.

Not only are future releases and settlements affected, but the panel majority decision below also casts a shadow of uncertainty over the potentially thousands of waivers that have already been signed nationwide. Employers who believed they had obtained valid releases from employees now find that a general release is only partially enforceable in the Fourth Circuit. For these employers, this uncertainty undermines the finality of a release they reasonably believed to be valid and for which they paid substantial consideration.

The decision below jeopardizes the ability of parties to informally settle any employment-related disputes and will affect the value of those settlements. Employers will be reluctant to offer reasonable settlement amounts if they believe that the accompanying releases will be unenforceable as to potential FMLA claims. The Court therefore should grant certiorari to provide much-needed clarity regarding this issue.

C. Barring Waivers And Requiring Supervision For Waivers Is Not Mandated By Statute Or Regulation

The panel majority below held that because the FMLA's remedial scheme closely resembles that of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, whose enforcement provisions authorize (but do not compel) the Department of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee . . . ," 29 U.S.C. § 216(c), the same standard should apply equally to FMLA claims. Unlike the FLSA, however, neither the FMLA nor its implementing regulations speak to supervision of

claim waivers. In addition, the FMLA and FLSA serve different purposes.

The FLSA was enacted "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (footnote omitted). As this Court observed in *Brooklyn Savings Bank v. O'Neil*, allowing employees to waive their substantive rights to a minimum wage or overtime compensation would run contrary to the purposes of the Act. *Id.* at 707. Accordingly, the Court would not allow employees to waive their rights under the FLSA when the fact of the employer's violation and the extent of its liability were uncontested, because to do so would, in effect, give judicial sanction to employment contracts that violated the statute.

In contrast to the FLSA, the purpose of the FMLA was not to set minimum terms or conditions of employment, but rather "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers . . . ." 29 U.S.C. § 2601(b). FMLA actions, like those brought under other federal laws such as Title VII and the ADEA, typically involve issues of fact and law not resolved by the statute, and resolution of those issues may require extensive discovery and litigation. Perhaps to short-circuit these inherent delays, Congress gave private individuals the right to pursue—and to resolve—their own claims under the FMLA, without court or Department supervision. Given these important distinctions between the two laws, it was error for the panel majority to rely on the FLSA's permissive,

statutory waiver supervision provisions in imposing such a requirement on waivers of FMLA claims.

Supervision adds a layer of review that is yet another disincentive to settlement of employment-related claims. There are numerous reasons for parties involved in a dispute to settle claims without litigation, including the ability to come to a resolution in a timely manner, less cost for the parties, and keeping issues private. Exposing to supervision any agreement that includes a release of FMLA claims, regardless of whether the underlying dispute involves an FMLA issue, defeats the purpose of settling an employment claim. Employers want to know that a settlement constitutes a final resolution of a dispute and that they will not be subject to further lawsuits filed by the same party. Without a full release, this cannot happen.

In addition, supervision of any situation involving a release doubtlessly will lead to a delay in processing by the Department of Labor or a court, which likewise will delay receipt of financial benefits. The resulting potential impact on employees is significant—receiving separation benefits or a financial settlement in a timely manner could mean the difference between a smooth transition to another job and financial hardship.

Furthermore, what might have been an acceptable agreement between two private parties now would be open to scrutiny on many levels. Supervision means that the terms to which the parties agreed would be open to changes by an uninvolved third party. Employers may have to defend every settlement involving a general release of claims, either legally or in the court of public opinion, no matter what the dispute.

Once filed in court, the settlements would become public documents, open to anyone who may have an interest in exploring their contents, including disgruntled former employees looking to file frivolous litigation. Both parties to private settlements believe them to be just that—private. Subjecting private settlements to Department of Labor or court supervision creates a disincentive for employers to agree to settlements as they may be accused of wrongdoing when the facts may not bear it out, again thrust into a situation of defending themselves needlessly. It creates a similar disincentive for employees who want to keep matters private. Settling claims before litigation keeps facts, such as those regarding an employee's medical leave or termination, out of the public domain.

Moreover, there currently is no workable mechanism in place for supervision of FMLA releases. The Secretary of Labor confirmed this to the court below. *See* Brief for the Secretary of Labor as *Amicus Curiae* at 14; Supplemental Brief on Panel Rehearing for the Secretary of Labor as *Amicus Curiae* at 4. Thus, it is not at all clear how an employer and employee who are exchanging a general release for an early retirement incentive, for example, would go about obtaining court or Department of Labor approval, or how the courts would have jurisdiction over such a situation where there is no dispute. Filing an FMLA lawsuit just to obtain a consent decree with respect to every general release of claims is simply not a reasonable option for anyone, including the federal courts.

It is critically important to both employers and employees that the Court provide much needed clarity regarding whether FMLA claims can be

waived. Given the uncertainty created by the panel majority decision below, and the potential impact on employers and employees alike, it is imperative that this question be resolved.

While it is conceivable that the Department of Labor could exercise its rulemaking authority to clarify that unsupervised waivers are permitted under the FMLA, that process could take several months, if not years.[4] Because of the significant impact the decision likely already has had on the use of waivers in the employment context, this Court should resolve the question presented in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RAE T. VANN
Counsel of Record
ALEXANDRA TSIROS
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

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[4] In 2002, this Court held in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 84 (2002), that the Department of Labor regulation at 29 C.F.R. § 825.700(a) was invalid. The Department of Labor has yet to redraft the language of that regulation five years later.